Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1551

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, Co-Partners d/b/a SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT,

Petitioners,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent,

— *vs.* —

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Claims

REPLY MEMORANDUM ON BEHALF OF PETITIONERS

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REPLY ARGUMENT

1. Equitable maintains it has a direct relationship to the United States because it has made a claim against United States monies. Equitable however was not a direct party on the contract with the United States and its rights, if any, are derivative. Thus Equitable's defense set up in their answering memorandum falls.

Indeed, Equitable conceeds, as indeed it must, that under *United States* v. *Sherwood*, 312 U. S. 584 (1941), no action of

a private derivative nature may be brought in the United States Court of Claims against a private party or the United States. The pertinent language in *Sherwood* provides:

> "We think it plain that the present suit could not have been maintained in the Court of Claims because that court is without jurisdiction of any suit brought against private parties and because adjudication of the right or capacity of respondent to proceed with the suit upon the contract of the judgment debtor with the United States is prerequisite to any recovery upon the Government contract."

Under the above holding the test of whether a claim is within the jurisdiction of the court depends upon whether rights under private instruments have to be construed by the court to confer standing to sue. If such construction is involved, no jurisdiction obtains.

In the instant case, the rehearing panel themselves made a construction, over protest of SEID, of a private security mortgage instrument to which the United States was not a party, and under which the mortgagee asserted rights against the mortgagor.

The court stated at page 61a of the Petition:

> "We hold that Clause 20 in the 1954 consolidated mortgage assigned all awards made by anyone past, present or future with respect to the mortgaged property to Equitable as mortgagee as security for its mortgage debt and that the assignment included the restoration award of $292,574.26 involved in the present suit. Equitable is entitled to recover the award so that it can be applied upon the unpaid mortgage debt."

Obviously to reach the conclusion that Equitable had standing and was also entitled to the award the court had to have and

did initially construe a private credit mortgage agreement. This cannot be done under *Sherwood*.[1]

Merely labeling a claim direct or characterizing the government's position as a stakeholder does not change the clear applicability of the *Sherwood* prohibition.

In *Ralston Steel Corporation* v. *United States*, 340 F. 2d 663, 669 (Ct. Cl. 1965) cert. denied 381 U. S. 950 (1965) the Court of Claims recognized that it lacked jurisdiction over any claim which required a determination of the rights of private litigants among themselves. The court held that it did have jurisdiction in that case as the plaintiff's claim was founded on statutes and as the claim did not require "determination of the rights of private litigants among themselves." 340 F. 2d at 669.

Great American Insurance Company v. *United States*, 397 F. 2d 289 (Ct. Cl. 1968) and *Hadden* v. *United States*, 132 F. Supp. 202 (Ct. Cl. 1955) cited by respondent Equitable do not help Equitable overcome the hurdle of demonstrating that it has a direct claim. For as Equitable conceeds, in both cases the plaintiff and the intervenors each had a direct claim against the United States. And in neither was it necessary to construe a private agreement between the plaintiff and intervenor as a prerequisite to recovery against the United States.[2]

It follows the action of the Court of Claims in this case is at variance with the settled practice in that court both before *United States* v. *Sherwood* (See Court of Claims cases cited at

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1. Of course a mortgage debt is not owed by SID (See Petition page 14), and the whole question of marshalling of assets involved in the pending foreclosure proceedings to which SID was not a party was ignored (Petition page 15) as well as the bar of the New York six years Statute of Limitations. (See Petition page 14). Moreover, discharge Law was wrongly applied (See Petition page 13).

2. *Great American Insurance Company* v. *United States*, was decided under 41 U. S. C. Section 114 (b). As a procedural statute Section 114 (b) permits the court to obtain jurisdiction over third parties with a direct interest in the claim against the United States. But, as Section 114 (c) indicates, the subject matter jurisdiction of the court was not expanded to permit the court to determine rights under a private instrument among private litigants especially where that determination confers standing. See *Rolls-Royce Limited, Derby England* v. *United States*, 364 F. 2d 415, 418 (Ct. Cl. 1966).

page 10 of Petition), and after *Sherwood; United States* v. *Berkley*, 276 F. 2d 9, 149 Ct. Cl. 549 (1966).

CONCLUSION

The action of the Court of Claims in the case at bar is at variance not only with a previous decision of this court but with earlier decisions of the Court of Claims. It is urged that the court should act to insure the proper interpretation and application of *United States* v. *Sherwood* by the Court of Claims, and no other relief is available to the petitioner and its counsel.

Respectfully submitted,

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